BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of the
Reserve Account of:

OCCIDENTAL LIFE INSURANCE
(Employer-Appellant)
c/o Robert L. Jordan & Associates

PRECEDENT
RULING DECISION
No. P-R-38
Case No. R-68-112

Employer Account No.

Claimant: Stella Bavaro
S.S.A. No.:
BYB: 02188 SD: 12306

The employer appealed from Referee's Decision No. LA-R-17973 which held the employer's reserve account was subject to benefit charges. Oral argument was submitted on behalf of the employer and the department.

STATEMENT OF FACTS

The claimant worked for the above employer as an intermediate file clerk from November 7, 1966 until December 30, 1966. Her final rate of pay was $1.70 per hour. On this job the claimant worked 25 hours a week, Monday through Friday, from 4:55 p.m. to 9:55 p.m.

At the same time the claimant had this work, she was also employed by a bank on a daily basis as a teller from 8:30 a.m. until 5 p.m. The record does not indicate her rate of pay on this job. Her work with the bank began on October 18, 1966 and ended January 27, 1967. She resigned from the bank for reasons not relevant to this decision.

The claimant last worked with the interested employer on December 30, 1966. Her supervisor had refused her the day off on Monday, January 2, 1967. She did not report to work after December 30, 1966.

The employer, on January 4, 1967, terminated the claimant on their records.

The claimant told the department she left work with the interested employer because the long hours of both jobs were too much of a strain on her.

All the evidence at the referee's hearing was hearsay within the meaning of the California Evidence Code.

The two questions in this case are:

1. What type of evidence can a referee rely on in ruling cases; and

2. Whether the employer's reserve account is subject to benefit charges.

REASONS FOR DECISION

In the present case, the referee found that the evidence relating to the claimant's separation from work was incompetent hearsay. He held the employer has the burden of proof and had not met this burden because their evidence was incompetent hearsay. The referee then sustained the adverse ruling of the department.

To support his conclusion that the evidence was unacceptable to make findings, the referee cites two California Appellate Court cases. The first case, Kinney v. Sacramento City Employees Retirement System, 77 Cal. App. 2d 779, 782, was decided in 1947. It did not involve an unemployment insurance matter. There was no specific statutory authority which excused the Sacramento City Employees Retirement Board from the strict hearsay evidence requirements. Such is not the case in unemployment insurance matters.

Section 1952 of the code provides in part:

> "1952. The Appeals Board and its representatives and referees are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure

but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties. . . ."

Title 22 of the California Administrative Code, section 5038(c), further says:

"(c) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions."

Both of the above sections of the law make it clear that the strict requirements in the Kinney case do not apply to unemployment insurance ruling appeals.

The other case cited by the referee is Stout v. Department of Employment (1959), 172 CA. 2d 666. He said the principle cited in the Kinney case was approved by the court in reference to an unemployment appeal. We do not understand this to be the meaning of Stout v. Department of Employment. The court in that case said:

"Appellant cites the case of Kinney v. Sac. etc. Retirement System, 77 Cal. App. 2d 779, 782 as authority for the statement, 'And an order of an administrative board based upon incompetent hearsay evidence contravenes due process and cannot stand.'

"The language of the court on this matter is as follows: 'The rule seems to be clear that, if a local administrative board bases its order solely on incompetent hearsay evidence, it acts arbitrarily, capriciously and in abuse of its discretion, and its order cannot stand.' (Emphasis added.) In Kinney v. Sac. etc. Retirement System, supra, the court further emphasized its point by stating (at pages 782-783): 'Since, as far as the record discloses, there was no competent evidence before the board outside of said report to refute the

> uniform proof that applicant's disability was due to the performance of his duty (citing case) within the meaning of the charter, there was a clear abuse of discretion on the part of the board in refusing petitioner's application, and the superior court correctly, as a matter of law upon the undisputed evidence, granted the writ of mandate prayed for by her.' (Emphasis added.) Considerable competent testimony was adduced and a number of documents were introduced in the instant case without objection. Any claimed contravention of due process on that basis is, therefore, clearly inapplicable to the proceedings in question."

These statements by the court show no decision was made as to whether a decision of the California Unemployment Insurance Appeals Board could be based solely on what is considered in a court of law as incompetent hearsay. The court concluded it need not face the question since there was other competent evidence.

According to Witkin on California Evidence, 2nd Edition:

> "The chief reasons for excluding hearsay evidence are said to be: (1) The statements are not made under oath; (2) the adverse party has no opportunity to cross-examine the person who made them; and (3) the jury cannot observe his demeanor while making them. (See Englebretson v. Ind. Acc. Com. (1915), 170 C. 793, 798, 151 P. 421; People v. Nagy (1926) 199 C. 235, 237, 248 P. 906; People v. Bob (1946) 29 C. 2d 321, 325, 175 P. 2d 12; cf. People v. Valdez (1947) 82 C.A. 2d 744, 749, 187 P. 2d 74 /constitutional guarantee of confrontation explained in terms of protection against hearsay/; McCormick, p. 457; 5 Wigmore, §§1362, 1365)."

The author of this treatise indicates the hearsay rule has been strongly criticized by modern legal theorists for the following reasons:

> " . . . (1) The rule was developed for jury trials and is in part based on a questionable distrust of the jury, while today the majority of cases are tried before judges and administrative tribunals. (2) The numerous and continually expanding exceptions to the rule demonstrate the belief of courts and legislatures that hearsay evidence is valuable in many situations. (3) The statutory abrogation of the hearsay rule in many kinds of administrative proceedings is a similar demonstration of the need for and usefulness of such evidence. (4) The rule that hearsay admitted without objection is evidence sufficient to sustain a verdict or finding is a further demonstration of the judicial recognition of its value. (See McCormick, p. 459; 5 Wigmore, §§1363, 1427; 2 U.C.L.A. L. Rev. 43, 45; Selected Writings, p. 975; cf. People v. Dalton (1959) 172 C.A. 2d 15, 18, 341 P. 2d 793, infra, §449)."

In California Portland Cement Company v. California Unemployment Insurance Appeals Board (1960), 178 Cal. App. 2d 263, 3 Cal. Rptr. 37, the District Court of Appeals did not question the evidence on which the referee relied, although it was no different than what was before the referee in the case under appeal.

This board recognizes that usually all evidence taken into the record by a referee in ruling appeals is hearsay within the meaning of the California Evidence Code.

In appeal hearings involving a ruling by the Department of Employment the claimant is not considered a party to the appeal (Cal. Adm. Code, Title 22, Section 5037). As a matter of practice, although the Department of Employment is now a party to such appeals, they do not appear at the hearing.

Appeal hearings on ruling matters, therefore, are essentially ex parte, and the interests of adverse parties are not in issue. Admittedly, some statements are not made under oath and the referee cannot observe the demeanor of the person who made the statement. However, the referees of the Appeals Board have extensive adjudicative experience and can excercise mature judgment.

In ruling cases, then, the main reasons for excluding hearsay evidence do not apply. We therefore conclude the evidence before the referee was sufficient to make findings of fact.

In Ruling Decision No. 121 the claimant absented himself from work without notice to the employer. The employer could not avail himself of the claimant's services when the claimant was not physically present to perform those services. We concluded the action of the employer in making an entry on its records that the claimant was discharged was simply the performance of a clerical function in recognition of the fact that the employer-employee relationship no longer existed because of the action of the claimant. We held that the claimant voluntarily left his work.

The facts in this case are the same and therefore the claimant voluntarily quit.

In Appeals Board Decision No. P-B-27 we held that there is good cause for the voluntary leaving of work where the facts disclose a real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

In Ruling Decision No. 32 we held that leaving part-time work for full-time work is generally a quit with good cause. We further held that where a claimant was faced with the alternative of giving up one of two jobs due to physical inability to perform both jobs and chose to retain the better paying job, she had good cause for leaving the work in question (Ruling Decision No. 25).

Here the claimant left part-time work to continue on her full-time job because the two jobs were too much of a strain on her. Under these circumstances, the claimant had good cause for quitting her work with the employer and the employer's reserve account is subject to benefit charges.

DECISION

The decision of the referee is affirmed. The employer's reserve account is subject to benefit charges under section 1032 of the code.

Sacramento, California, February 27, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

LOWELL NELSON

CLAUDE MINARD

JOHN B. WEISS

DON BLEWETT